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United States Bankruptcy Court
San Jose, California

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF CALIFORNIA

In re] Case No. 01-55137-ASW
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SILICON VALLEY TELECOM] Chapter 11
EXCHANGE, LLC,]
] Debtor.]
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MEMORANDUM DECISION FOLLOWING EVIDENTIARY HEARING

This matter comes before the Court on a motion to compel Debtor to make plan payments, to appoint a receiver, or to convert the case to Chapter 7. Debtor Silicon Valley Telecom Exchange, LLC (hereafter, "Debtor") is represented by attorney Marc Pinckney. Movant Campeau Goodsell Smith (hereafter, "CGS") -- which represented Debtor in the bankruptcy case through confirmation of the Chapter 11 Plan -- is represented by attorney Gregory Charles. Movant Law Offices of David Tilem (hereafter, "Tilem") is represented by attorneys Bernard Greenfield and Marcia Gerston.

At the heart of this dispute, the parties disagree about the proper method for calculating payments due under the confirmed Plan. This Court has been asked to determine several related issues, including: (1) whether Debtor has complied with the terms

1 of Debtor's confirmed Chapter 11 Plan concerning payments to
2 general unsecured creditors; (2) whether Debtor has complied with
3 the terms of this Court's July 23, 2010 Order (hereafter, "the July
4 23, 2010 Order") on the parties' stipulation which clarifies
5 Debtor's Plan payment obligations with regard to the general
6 unsecured creditors; and (3) if Debtor has failed to comply with
7 either the Plan or the July 23, 2010 Order, whether the Court
8 should then convert the case to Chapter 7 or appoint a receiver to
9 manage Debtor's business operations. Movants have also asked the
10 Court to determine the appropriate method for calculating payments
11 due to the general unsecured creditors under the Plan.

12 The Court held an evidentiary hearing.¹ After the hearing,
13 the parties submitted written briefs in the nature of closing
14 argument. The Court has considered the evidence admitted at the
15 hearing, the written and oral arguments of counsel, and matters of
16 which this Court may take judicial notice. For the following
17 reasons, the Court finds that some relief is appropriate and will
18 compel Debtor to make Plan payments, but the Court will not order
19 appointment of a receiver nor convert the case to Chapter 7, as
20 requested by CGS and Tilem.

21

22 **I. Findings of Fact**

23 **A. The Confirmed Plan**

24 Debtor commenced this bankruptcy case under Chapter 11 on
25 October 22, 2001. However, a Chapter 11 plan was not confirmed
26 until almost six years later. On August 24, 2007, after a hearing,

27

28 ¹ The evidentiary hearing occurred on several dates and was
interrupted at the request of the parties so that they could engage
in settlement negotiations.

1 the Court confirmed Debtor's Third Amended Joint Plan of
2 Reorganization ("the Plan"). The Plan was a joint plan for three
3 separate debtors: Rubio & Associates, Inc.; Silicon Valley Telecom
4 & Internet Exchange, LLC ("SVTIX"); and Debtor Silicon Valley
5 Telecom Exchange, LLC ("SVTX"). However, the Plan was confirmed
6 only as to SVTX. Transcript ("Tr.") 179:21-25; 180:1-5.

7 The Court confirmed the Plan over objections from Tilem, as
8 assignee of the claim of creditor Corporate Builders, Inc.
9 (hereafter, "CBI"). The Court overruled Tilem's objections as
10 untimely. The Plan's effective date was sometime in September
11 2007.²

12
13 **Plan Execution**

14 The Plan identifies the following means for the Plan's
15 execution:

16 The funds necessary to implement the Plan
17 will be derived from Debtor's post-Petition
business operations and/or from monies on hand.

18 **Debtor's Business Operations.** The
19 payments to be made to creditors under the Plan
will be drawn from the proceeds of Debtor's
operations. Debtor's expected operating
20 results are set forth in Exhibit A to the
Disclosure Statement, which is a pro forma
21 income statement for the five year period of
the Plan payments and which shows Debtor's
22 anticipated financial condition from the
Effective Date of the Plan. The projections
23 anticipate that cash flow from operations after
the Effective Date will be sufficient to meet
24 Debtor's operating obligations and Plan
obligations on an on-going basis. Debtor
25 anticipates an increase in rents from lease of
additional space available to SVTX as a result
26 of Enron's termination of its leasehold

27
28 ² In questioning Mr. Rubio, Mr. Charles stated that the Plan
was effective on September 20, 2007. Tr. 83:21-25.

interest, and Debtor anticipates an increase in rents from lease of space available to SVTIX.

Plan at ¶ IX. The Plan also specifies when payments to creditors are due, as follows:

Quarterly Payment Dates. The Plan provides for quarterly payments to claimants. Quarterly payments will be made within ten (10) days after January 1, April 1, June 1, and October 1 ("Quarterly Payment Date") of each calendar year after the Confirmation Date until claimants are paid in full as provided for by this Plan. The first quarterly payment will be made the first Quarterly Payment Date that occurs 90 days after the Confirmation Date.

Id.

If Debtor fails to make payments as required by the Plan, the Plan provides what will occur in the event of a default:

Default. In the event that the Reorganized Debtor defaults in the performance of its obligations under this Plan, and shall not have cured such default within a period of ten (10) days after receipt of written notice of default from the holder of any allowed claim, then the holder of such allowed claim may pursue such remedies as are permitted by law. . . . If there is a material default under the terms of the plan and upon a successful post-confirmation motion to convert this case to a case under Chapter 7 of title 11, this plan shall terminate, and the Chapter 7 estate shall consist of all remaining property not already administered.

Id.

Under the Plan, the Court has retained jurisdiction to resolve any dispute regarding the interpretation of the Plan, to enforce and implement the Plan, to enter orders "in aid of consummation" of the Plan, and to modify the Plan under 11 U.S.C. § 1127, among other things not applicable to the instant motion. *Id.* at ¶ X.

1 Required Payments Under Plan

2 The Plan requires Debtor to pay all allowed general unsecured
3 claims³ from multiple sources. These unsecured creditors are to
4 share, on a pro rata basis, in the following: an Effective Date
5 Payment of \$50,000.00; distributions from Enron's Chapter 11
6 bankruptcy case,⁴ including an amount of \$192,302.74 already
7 collected; and any preference recoveries. Significant to the
8 instant matter, each creditor is also entitled to quarterly
9 payments consisting of a "pro rata distribution of 80% of the net
10 proceeds of Debtor's on-going operations, which payments shall
11 continue until claimant is paid in full for the principal amount of
12 its claim plus interest accruing at the Federal Rate." Plan at ¶¶
13 VI.D through VI.L.⁵

14 Debtor, CGS, and Tilem disagree as to the meaning of "net
15 proceeds." In his testimony, Scott Goodsell⁶ agreed that the term

16 ³ The Plan and Disclosure Statement identify the following
17 holders of general unsecured claims: CB Richard Ellis, Granite
18 Capital/Telegis, CBI, Verio, Inc., Fernando (aka Fred) and Karen
19 Rubio, Michael Oaks, and NTT America. Debtor's Addendum to the
20 Disclosure Statement filed August 17, 2007, identifies the amounts
21 owed to each of the unsecured creditors, as follows: CB Richard
Ellis (\$65,435.09), Granite Capital (\$102,245.52), CBI
(\$500,000.00), Verio, Inc. (\$180,389.70), Fred and Karen Rubio
(\$0.00), Michael Oaks (\$30,000.00), and NTT America (\$30,000.00).

22 ⁴ Enron's involvement is discussed more fully infra.

23 ⁵ By contrast, the Addendum to the Disclosure Statement stated
24 that the source of the payments will be "80% of the net profit of
25 Plan Proponents' business operations (the remaining 20% of net
profits will be held in a reserve account for payment of
unanticipated expenses)." Addendum at p. 3, lines 4-8.

26 ⁶ In addition to being an attorney with CGS, Mr. Goodsell is
27 also a Certified Internal Auditor. Tr. 146:18-21. Mr. Goodsell
described this certification as being equivalent to a Certified
28 Public Accountant. Tr. 146:19-25. However, CGS's attorney
(continued...)

1 "net proceeds from ongoing business operations" was a term drafted
2 by Mr. Goodsell, and that the Plan does not define "net proceeds."
3 Tr. 293:13-25. Prior to confirmation, Mr. Pinckney (then of CGS)
4 agreed in open court at the hearing held August 24, 2007, that
5 "profits" would mean "proceeds" under the Plan, but no such
6 definition was ever incorporated.

7 It was CGS's attorneys who drafted the Plan and Disclosure
8 Statement in this case. Tr. 186:22-25; Tr. 187:1-3. One of the
9 primary authors of the Plan was Debtor's attorney, Scott Goodsell
10 of CGS. Tr. 153:7-9. However, according to Mr. Goodsell, the
11 Third Amended Plan was drafted by attorney Marc Pinckney, who at
12 the time worked for CGS. Tr. 293:9-12.⁷

13 Complicating the absence of a definition is the fact that "net
14 proceeds" is not an accounting term. Debtor's accountant, Laurie
15 Orlando -- who testified that she has not seen the Plan -- stated
16 that "net proceeds" is not an accounting term and therefore would
17 need to be defined. Tr. 364:3-4; Tr. 366:1-3.⁸ The absence of a
18 clear definition of "net proceeds" was raised by Tilem in his

19 ⁶(...continued)
20 declined to offer Mr. Goodsell as an accounting expert, after
21 counsel for Debtor objected. Tr. 175:7-17.

22 ⁷ With regard to the main bankruptcy case, attorneys at CGS
23 continued to represent Debtor through confirmation of the Plan
24 until at least September 2007. Mr. Pinckney advised that CGS
25 continued to represent Debtor in 2008 in Adversary Proceeding No.
08-5001. However, it was Mr. Pinckney -- not Mr. Goodsell -- who
filed the interpleader complaint on January 2, 2008. At the time,
Mr. Pinckney still worked for CGS.

26 ⁸ By contrast, Ms. Orlando testified that "net profit" is an
accounting term, but did not define the term. Tr. 378:20-22; Tr.
27 379:14. Ms. Orlando also testified that the term "net income" is
different from "net profit." Tr. 382:7-8 and 18-24; Tr. 383:16-21;
28 Tr. 384:5-10 and 22-25.

1 objection to confirmation, but because the objection was untimely,
2 the issue has not been addressed until now.

Even without a clear definition, the parties' attributed similar, but not identical, meanings to the term "net proceeds." Fred Rubio, II,⁹ the principal, owner, and manager of Debtor, testified that the Plan required Mr. Rubio "to pay on a quarterly basis . . . the creditors, after looking at a cash basis, 80 percent of the net proceeds" and that "20 percent basically goes to a reserve account." Tr. 25:11-14; Tr. 51:8-21. Mr. Rubio also testified that he had discussions with his accountants, Ms. Orlando and Victoria Martini, to determine what the term "net proceeds" means. Tr. 26:24-25 and 49:1. Mr. Rubio understood that "net proceeds" were the "net profits after all expenses are paid" for a particular time period -- or "income minus expenses." Tr. 116:8-13. Mr. Goodsell agreed with Mr. Rubio's definition, and added that regular operating expenses should be subtracted from gross proceeds to obtain net proceeds. Tr. 160:13-17; Tr. 222:5-11. According to Mr. Goodsell, operating expenses would not include major renovations, improvements, or repairs. Tr. 163:16-12; Tr. 300:15-23; Tr. 465:23-25; Tr. 466:1.

21 The purpose behind the 80%/20% split in the Plan was to ensure
22 that creditors would be paid, while at the same time setting aside
23 some funds for the Debtor to use for improvements or repairs. Tr.
24 153:22-25; Tr. 154:1-4; Tr. 163:16-20. Debtor's Disclosure
25 Statement,¹⁰ including the Addendum thereto, explained that the

⁹ Mr. Rubio's actual name is Fernando Rubio, Jr., but he uses the name Fred. Tr. 527:20-21; Tr. 528:18.

¹⁰ The Disclosure Statement (or "DS") was entitled "[Third
(continued...)]

1 remaining 20% would be "held by Debtor as a reserve to pay for
2 unanticipated but necessary building repairs or other expenses
3 necessary for the preservation of Debtor's operations[.]" DS at p.
4 12, lines 9-12. Attached to the Disclosure Statement was a Cash
5 Flow Analysis projecting quarterly payments ranging from \$70,363.00
6 to \$667,219.05 to the general unsecured creditors from the second
7 quarter of 2003 through the first quarter of 2008. The Cash Flow
8 Analysis did not project any major repairs or improvements. Mr.
9 Rubio agreed that Debtor projected no capital expenses between
10 April 1, 2006 and March 31, 2011, in evaluating Debtor's present
11 value for purposes of the Disclosure Statement. Tr. 73:9-25; Tr.
12 74:1-13.

13 At the hearing, Mr. Goodsell testified that he did not believe
14 that Debtor could make principal and interest payments to San Jose
15 National Bank as part of Debtor's operations, and that payments
16 toward principal could not be deducted before calculating net
17 proceeds. Tr. 438:7-16. Mr. Goodsell believed that the meaning of
18 "net proceeds" later changed such that the principal payments could
19 not be deducted. Tr. 445:1-12; Tr. 446:1-2; Tr. 447:25 to 448:9.
20 The Court finds such testimony to be disingenuous, at best, because
21 it is contradicted by the Plan, drafted by attorneys at CGS, which
22 requires Debtor to pay the principal obligation. The testimony is
23 also contradicted by the Cash Flow Analysis submitted with the
24 Disclosure Statement. The Cash Flow Analysis shows that Debtor
25 anticipated the entire payment to San Jose National Bank -- along
26 with other amounts paid, such as rent, insurance, taxes, utilities,

27 ¹⁰(...continued)
28 Amended] Disclosure Statement on Joint Plan of Reorganization."

1 landscaping, payroll, and similar expenses -- would be excluded
2 before calculating the 80% amount payable to creditors. This
3 treatment of the payment to San Jose National Bank, including the
4 principal reduction payments, was fully disclosed to all creditors
5 prior to confirmation. Regardless, the propriety of the payment to
6 San Jose National Bank is not the central issue before this Court.
7 Apart from the complaints made by CGS, there have been no other
8 objections to these payments.

9

10 **B. Debtor's Business**

11 Rubio and Associates, a business operated by Fred Rubio, II,
12 leased a warehouse located at 250 Stockton Street, San Jose,
13 California ("the Property"), from the San Jose Unified School
14 District starting in 1999. Tr. 123:8-13; Tr. 255:2-6. In 1999,
15 Mr. Rubio formed Debtor and became Debtor's managing member. Tr.
16 528:5-7 and 16-18; Tr. 529:9. Debtor took over the master lease¹¹
17 of the Property for purposes of operating a co-location facility on
18 the premises. Tr. 180:7-12. According to Mr. Rubio, a co-location
19 facility is a data center where different companies place their
20 computer servers and sometimes outsource maintenance and
21 management. Tr. 532:17-23. Debtor leased parts of the facility to
22 various tenants, including Enron, Verio, and NTTA. Tr. 180:13-15.
23 The master lease will expire in April or May 2019, but has a five-
24 year option to renew. Tr. 598:22-24.

25 In 2000, Mr. Rubio formed SVTIX and became SVTIX's managing
26 member. Tr. 528:24-25; 529:1 and 10-12. The purpose of SVTIX was

27 ¹¹ At the hearing on November 22, 2011, Mr. Goodsell testified
28 that the master lease "probably has about 10 years to run." Tr.
255:7-9.

1 to oversee the "meet me room," a large utility room where the
2 carriers (such as AT&T, Verizon, and others) reside. Tr. 531:11-
3 23; Tr. 534:7-11. SVTIX rents space on the first floor of the
4 Property, colloquially referred to as "the basement." Tr. 181:3-
5 11.

6 Mr. Rubio manages and operates Debtor's and SVTIX's business
7 on the Property. Tr. 123:14-25; Tr. 124:5-19; Tr. 529:2-6. Mr.
8 Rubio testified that Mr. Rubio was in charge of Debtor's day-to-day
9 finances until the accountants took over that responsibility in
10 September 2009. Tr. 59:20-22; Tr. 117:1-8. Mr. Rubio works in
11 real estate, and is neither an engineer nor an accountant. Tr.
12 120:25 to 121:6-12.

13 It is Mr. Rubio's wife, Karen Rubio, who keeps Debtor's books,
14 receives the rent and other income, writes and records checks, and
15 calculates the quarterly Plan distributions. Tr. 529:18-25; Tr.
16 530:1-14. To accomplish these tasks, Ms. Rubio uses QuickBooks
17 Pro, on which she has received some training. Tr. 602:11-19.
18 However, Ms. Rubio is not an accountant and does not know
19 definitions for all accounting terms, such as "amortization." Tr.
20 603:11-12; Tr. 615:24-25. Ms. Rubio recalled "glancing" at the
21 Plan, but confessed that she has not read the Plan in depth and has
22 not reviewed the amended Disclosure Statement. Tr. 617:7-14. Ms.
23 Rubio testified that in deciding how much money to pay to CGS under
24 the Plan, Ms. Rubio had no instruction; instead, Ms. Rubio simply
25 took the cash balance for the companies and subtracted "imminent
26 expenses." Tr. 623:10-17.

27 Debtor pays a total salary to Mr. and Ms. Rubio of \$15,000 per
28 month. Tr. 258:21-25; Tr. 259:1-2. Debtor has also paid other

1 members of the Rubio family for work performed at the Property.
2 According to Mr. Rubio, Starting in 2010, two of Mr. and Ms.
3 Rubio's three sons -- Fred, Ryan, and Eric -- worked for the Debtor
4 as Building Operating Center Technicians. Tr. 75:19-24; Tr. 76:23-
5 25; Tr. 77:5-9. In that role, the sons performed "reboots" and
6 "KVM," swapped hard drives, took down firewalls, and traced network
7 cables. Tr. 76:1-3. At one point or another, all three of Mr.
8 Rubio's sons worked for Debtor. Tr. 121:22 to 122:6. Mr. Rubio
9 set his sons' rates of pay. Tr. 76:14-15. Some of the sons' high
10 school friends also worked for Debtor performing landscaping and
11 painting work. Tr. 77:16-20; Tr. 122:10-13. According to Mr.
12 Goodsell and Mr. Rubio, Debtor also pays a woman named Jackie
13 Fitzpatrick a fixed monthly commission to bring in new clients.¹²
14 Tr. 127:14-25; Tr. 128:1-2; Tr. 259:12-16; Tr. 260:1-2. In 2008,
15 the commission was \$10,000.00 per month. Tr. 127:25; Tr. 128:1.

In 2001, one of the tenants at the Property -- Enron -- filed for Chapter 11 bankruptcy and rejected Enron's lease with Debtor. Tr. 181:17-22; Tr. 534:14-20. Enron vacated the Property and abandoned approximately \$20 million in equipment, all of which was built into the Property. Tr. 534:17-20; Tr. 536:24-25; Tr. 537:1; Tr. 537:6-11. After Enron departed, SVTIX assumed responsibility for the operation of the Enron equipment. Tr. 540:6-9. SVTIX was unable to lease the entire space vacated by Enron, but was able to lease "lots and lots and lots of cabinets." Tr. 538:6-14. To the new tenants, SVTIX provided maintenance and management of the

27 ¹² It was not clear from the testimony when Ms. Fitzpatrick
28 began to work for Debtor. The commission paid to Ms. Fitzpatrick
was not listed on the Cash Flow Analysis submitted with the
Disclosure Statement prior to confirmation.

1 tenants' equipment, such as rebooting computers and performing an
2 operation called "keyboard, video, and mouse" (KVM), which allows
3 customers from around the world to monitor the customers' equipment
4 from remote locations. Tr. 540:15-24; Tr. 541:7-19.

5 Mr. Rubio testified that Debtor made leasehold improvements at
6 the Property in 2007. The improvements included building out the
7 cabinets and racks, adding electrical infrastructure to some of the
8 Enron rooms, bolting down the cabinets and ladder racking, and
9 building up the data centers. Tr. 63:14-23.

According to Mr. Rubio, Debtor spent between \$47,000 and \$48,000 on cost of goods sold in 2007. Tr. 65:10-12. Mr. Rubio also testified that in 2008, 2009, and 2010, Debtor spent a bit more than \$23,000, \$18,000, and \$20,000, respectively, on cost of goods sold. Tr. 65:13-18.

15 Mr. Rubio also testified about the difference between
16 maintenance and repairs. Tr. 66:10-15. Mr. Rubio stated that
17 maintenance pertains to maintaining existing electrical
18 infrastructure, such as servicing the generators, the UPS,¹³ and the
19 electrical systems. Tr. 66:10-15. By contrast, a repair involves
20 repairing an existing broken item, such as a broken pipe, a damaged
21 fence, leaking batteries, or air conditioning systems. Tr. 66:10-
22 15. Mr. Rubio further stated that repairs are not improvements.
23 Tr. 67:1-2.

According to Mr. Rubio, Debtor spent \$41,822.95 on contractors in 2007, \$230,572.69 on contractors in 2008, \$201,836.08 on

¹³ UPS stands for "uninterrupted power supply." Tr. 542:2-5. Each UPS serves as a battery backup system which protects against losses caused by power outages. Tr. 128:22-24; Tr. 593:24-25; Tr. 594:1-3.

1 contractors in 2009, and \$76,059.46 on contractors in the first
2 half of 2010. Tr. 67:5 to 68:2; Tr. 70:11-19; Tr. 72:1-9. Mr.
3 Rubio clarified that contractors were entities that were "building
4 things at the building." Tr. 68:5-7. Mr. Rubio stated that the
5 type of work performed by the contractors could be repairs,
6 maintenance, or "new installs." Tr. 68:19-22. Ms. Rubio verified
7 that contractor expenses included monthly service and maintenance
8 contracts. Tr. 606:3-15.

9 Of the \$41,822.95 spent on contractors in 2007, Mr. Rubio
10 testified than none was spent on new infrastructure, but instead
11 was used to expand the existing infrastructure in the Enron Data
12 Center. Tr. 69:15-17; Tr. 70:11-24. In 2008, Debtor spent
13 \$230,572.69 on infrastructure improvements; Debtor bought a new UPS
14 system and installed rows of cabinets, cages, and ladder racking.
15 Tr. 69:18-19; Tr. 71:4-14; Tr. 72:1-3. The UPS system purchased in
16 2008 -- which Debtor referred to as "UPS Charlie" -- was installed
17 in the summer of 2008 at a cost of \$115,000.00. Tr. 542:24-25; Tr.
18 543:1-4 and 16-18. According to Mr. Rubio, once UPS Charlie was
19 installed, there were customers who needed to use it, and UPS
20 Charlie began to generate \$33,000.00 per month. Tr. 543:5-13.
21 Within a few months, UPS Charlie had paid for itself.

22 Between confirmation of the Plan and the end of 2008, Mr.
23 Rubio agreed that Debtor performed speculative improvements to the
24 building in the hope of attracting new tenants, which included a
25 new transformer at a cost of \$38,000.00, with a \$26,000.00
26 installation cost. Tr. 128:16-21; Tr. 130:1-3. Mr. Rubio also
27 agreed that Debtor replaced at least one UPS system at a cost of
28 \$28,000.00, plus \$15,000.00 in installation costs. Tr. 128:22 to

1 129:12. Debtor also installed lighting ballasts outside because
2 NTTA complained that women were being accosted in the parking lot.
3 Tr. 129:13-21. According to Ms. Rubio, Debtor also had security
4 expenses, which were the main item charged under the "consulting
5 expenses" category. Tr. 604:12-14. Ms. Rubio also explained that
6 the consulting category did not include expenses for construction
7 of improvements, such as the installation of UPS systems. Tr.
8 604:21-25; Tr. 605:1-3. Instead, any large equipment purchases --
9 such as the UPS systems or replacement transformers -- would be
10 charged as a fixed asset expense. Tr. 606:20-25; Tr. 607:1-5.

11 In 2009, Debtor spent \$201,836.08 on infrastructure
12 improvements on the air conditioning system, as well as on "walls
13 in the power room in the basement." Tr. 69:20-23; Tr. 72:4-6. In
14 the first half of 2010, Debtor spent \$76,059.46 on infrastructure
15 improvements. Tr. 72:7-9. Mr. Rubio also testified that Debtor
16 purchased another UPS system -- "UPS David" -- in 2010 for
17 approximately \$115,000.00 to \$120,000.00. Tr. 544:16-24; Tr.
18 545:2-3. However, Mr. Rubio stated that only 16 to 17 percent of
19 UPS David was rented out to customers, because Mr. Goodsell told
20 Mr. Rubio to cease spending money on construction in May 2010 to
21 avoid violating the terms of the Plan. Tr. 545:12-24; Tr. 547:25;
22 Tr. 548:1-6; Tr. 549:21-24; Tr. 550:17-23.

23 Mr. Rubio testified that without further construction, the
24 remainder of UPS David could not be leased to customers. Tr.
25 551:5-14. Mr. Rubio also stated that Debtor ceased purchasing
26 cabinets and power for UPS David, even though those costs would
27 have been reimbursed by any customers. Tr. 553:18-25. Debtor
28 purchased \$22,000.00 in cabinets in April 2010, which allowed for a

portion of UPS David to be leased. Tr. 576:20-25. Slightly more than this amount was reimbursed through non-recurring charges to the customers. Tr. 577:12-15; Tr. 609:21-25. Mr. Rubio believed that if the construction had taken place, Debtor would have been able to lease all of UPS David. Tr. 554:20-22. In other words, Mr. Rubio believed that if Debtor had been allowed to build out UPS David, the construction would have paid for itself.

Mr. Goodsell testified that two of Debtor's "big footprint tenants" -- Verio and NTTA -- left the property in May 2010 and were never replaced with other "big footprint tenants." Tr. 243:1-5; Tr. 244:7-12. As a result, Debtor's revenues declined. Tr. 243:1-5; Tr. 258:7-20. According to Mr. Goodsell, the revenue stream from Verio and NTTA¹⁴ was sufficient -- in fact critical -- to fund the Plan, but when Verio and NTTA left the Property, it became highly unlikely that creditors would be paid. Tr. 243:7-19.

Mr. Rubio acknowledged that rents dropped significantly after Verio and NTTA left the Property, and that Debtor needed to replace these rents in order to remain solvent. Tr. 556:20-24; Tr. 574:6-8. Verio had been paying monthly rent of \$55,000.00, and NTTA had been paying monthly rent of \$35,000.00. Tr. 557:6-21. In addition, both Verio and NTTA had paid a pro rata share of taxes, insurance, and other expenses. Tr. 557:6-21. Mr. Rubio explained that Debtor had been unable to attract tenants to the space left vacant by Verio and NTTA because of soil contamination located near diesel power generators, which was disclosed to Debtor in May 2010, and which Verio agreed to remediate. Tr. 558:4-15; Tr. 559:14-25;

¹⁴ According to Mr. Goodsell, the revenue from Verio and NTTA was "probably 75 grand a month, maybe more[.]" Tr. 258:11.

1 Tr. 561:3-14. Mr. Rubio testified that some remediation was
2 performed, but the Property is still not leasable because the San
3 Jose Fire Department and Santa Clara County Health Services have
4 not provided a closure letter stating that the Property is clean.
5 Tr. 562:4-7; Tr. 565:7-25. Also, the diesel generators have not
6 been inspected, and Verio and NTTA have been unwilling to perform
7 any testing of the generators. Tr. 566:20-25; Tr. 567:16-24.
8 According to Mr. Rubio, the soil contamination is the subject of a
9 lawsuit now pending in federal court. Tr. 567:24-25.¹⁵

Both Debtor and SVTIX hired Ms. Orlando, a Certified Public Accountant, to prepare tax returns for tax years 2007, 2008, and 2009. Tr. 334:15-17; Tr. 335: 10-22. To prepare the returns, Ms. Orlando obtained balance sheets, income statements, and loan documentation from Karen Rubio. Tr. 336:6-11. According to Ms. Orlando, for tax year 2007, Debtor and SVTIX's combined income was \$2,155,465.00, but the cost of sales and direct expenses were \$1,315,785.00, after disregarding intercompany charges for rents and utilities. Tr. 355:5-7; Tr. 359:11-16. Similarly, for tax year 2008, Debtor and SVTIX's combined income was \$2,530,079.00, with cost of sales and direct expenses of \$1,608,281.00. Tr. 355:8-11; Tr. 359:17-18. For tax year 2009, Debtor and SVTIX's combined income was \$3,330,676.00, with cost of sales and direct expenses of \$2,045,262.00. Tr. 359:3-7 and 19-20.

¹⁵ According to PACER, the district court case is Case No. 12-cv-00899-HRL, and remains pending.

1 **C. Payments to Creditors**

2 CGS and Tilem are creditors. Tilem is a creditor of claimant
3 CBI and thus claims to be a general unsecured creditor. By
4 contrast, CGS is a creditor due to the attorney's fees owed by
5 Debtor.

6 Approximately four months after the Plan was confirmed, on
7 December 28, 2007, CGS filed an application with the Court seeking
8 \$1,238,814.68 for services performed and costs expended during the
9 case. If approved, this would have brought the total fees paid in
10 the case to \$1,819,701.20, and the total expenses to \$45,260.59.
11 On March 19, 2008, the Court issued an order authorizing interim
12 compensation to CGS in the amount of \$400,000.00, to be split
13 between Debtor, SVTIX, and Rubio & Associates. At a hearing held
14 July 17, 2008, Debtor, CGS, and interested parties SVTIX and Rubio
15 & Associates, agreed that the net fees and costs remaining to be
16 paid by Debtor (SVTX) were \$948,033.97 and \$45,260.59,
17 respectively. Debtor, CGS, and the interested parties also agreed
18 that the fees and costs to be paid for the interpleader proceeding
19 were \$4,000.00 and \$313.00, respectively. As of November 22, 2011,
20 Debtor continued to owe CGS approximately \$410,000 in fees. Tr.
21 253:23-25. That amount continues to accrue interest at the Federal
22 Rate, as specified by the Plan. Tr. 254:1-4.

23 Mr. Rubio testified to his understanding that CGS is to be
24 paid before any other creditor. Tr. 134:14-25 and 135:1-10. Mr.
25 Goodsell confirmed that CGS's claim is to be paid "as an
26 administrative claim" before any payment to unsecured creditors.
27 Tr. 293:3-7. The parties filed a Joint Pretrial Statement in which
28

UNITED STATES BANKRUPTCY COURT
For The Northern District Of California

1 the parties stipulated to the following facts concerning Debtor's
2 cash balances and amounts actually paid to CGS:

3 4 5 Calendar Quarter Ending Date	Debtor's 6 (SVTX) 7 Balance Sheet Cash 8 Balance	SVTIX Balance Sheet Cash 9 Balance	Amount Paid to CGS
10 12/2007	\$161,597.18	\$41,664.05	\$0.00
11 3/2008	\$40,017.90	\$85,072.39	\$87,268 on 2/15/08
12 6/2008	\$62,347.51	\$25,387.66	\$0.00
13 9/2008	\$82,255.87	\$43,429.54	\$0.00
14 12/2008	(\$48,433.90)	(\$113,852.82)	\$219,000 on 12/28/08
15 3/2009	\$98,195.83	\$45,296.57	\$0.00
16 6/2009	\$32,223.79	\$88,696.96	\$50,000 on 7/14/09
17 9/2009	\$96,770.48	\$13,476.00	\$19,500 on 10/30/09
18 12/2009	\$79,318.49	(\$46,324.24)	\$198,159.06 on 12/29/09 and 12/30/09
19 3/2010	\$17,167.26	\$196,815.96	\$158,916.67 on 4/7/10 and 5/19/10
20 6/2010	\$596.14	\$15,996.43	\$13,274.05 on 7/8/10
21 TOTAL PAID TO CGS			\$746,117.78

22 It is Debtor's contention that calculation of the amount due
23 to creditors should be premised upon a "balance sheet cash
24 balance."¹⁶ By contrast, CGS and Tilem assert that the calculation
25 should be premised upon "reported SVTX cash basis profits." The
parties' joint statement provides that the difference between these
two methods is that Debtor's calculation includes checks which have
been written but not yet presented to the bank for payment, while

26 _____
27 ¹⁶ Mr. Rubio testified that he first heard the term "balance
sheet cash balance" in the later part of 2009 from accountants
28 Victoria Martini and/or Laurie Orlando. Tr. 115:16-19 and 116:1-2.

1 CGS and Tilem do not factor unpresented checks into the
2 calculation.

3 Notwithstanding Debtor's assertion that the calculation of the
4 amount due should be based upon the balance sheet cash balance, the
5 above table shows that in most quarters, Debtor, together with
6 SVTIX, paid CGS less than 80% of the balance sheet cash balance.
7 However, there were quarters in which Debtor made a payment to CGS
8 despite a negative balance sheet cash balance -- for instance, the
9 quarters ending December 2008 and December 2009.

10 It is difficult to calculate the precise amount which Debtor
11 should have paid to CGS, but the parties' data allow for an
12 estimate. Based upon the parties' stipulated figures, the Court
13 has calculated that if Debtor and SVTIX had segregated 80% of each
14 balance sheet cash balance for CGS, the following amounts could¹⁷
15 have been available to pay CGS:

16 Calendar 17 Quarter Ending 18 Date	19 80% of Debtor's 20 (SVTIX) Balance 21 Sheet Cash 22 Balance	23 80% of SVTIX's 24 Balance Sheet 25 Cash Balance	26 Total Available 27 for CGS
12/2007	\$129,277.74	\$33,331.24	\$162,608.98
3/2008	\$32,014.32	\$68,057.91	\$100,072.23
6/2008	\$49,878.00	\$20,310.13	\$70,188.13
9/2008	\$65,804.70	\$34,743.63	\$100,548.33

28
29 ¹⁷ The Court qualifies this finding, because there were
30 quarters in which Debtor posted negative balance sheet cash
31 balances due to payments made to CGS during those quarters.